BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES E. STEPHENS	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,986
QUEEN PRICE CHOPPER	)	
Respondent	)	
AND	)	
	)	
BENCHMARK INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The claimant, James E. Stephens, appealed the May 15, 2002 Award and the May 20, 2002 Nunc Pro Tunc Award, both of which were entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on November 15, 2002.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for Mr. Stephens. Brenden W. Webb of Overland Park, Kansas, appeared for the employer, Queen Price Chopper, and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award and Nunc Pro Tunc Award.

ISSUES

This is a claim for a June 26, 1996 accident and resulting low back injury. The parties agreed Mr. Stephens injured his back on June 26, 1996, and that the accidental injury arose out of and in the course of his employment with Queen Price Chopper.

In the Award and the Nunc Pro Tunc Award, Judge Howard determined Mr. Stephens was entitled to receive permanent partial general disability benefits for a 25 percent whole body functional impairment instead of benefits for a permanent total

disability. In determining that Mr. Stephens did not sustain a work disability (a permanent partial general disability greater than the functional impairment rating), the Judge imputed a post-injury average weekly wage that was at least 90 percent of Mr. Stephens' pre-injury wage.

Mr. Stephens contends Judge Howard erred. Mr. Stephens argues he is realistically unemployable and, therefore, entitled to receive benefits for a permanent total disability. In addition, Mr. Stephens contends he should be awarded ongoing medical care and treatment rather than being required either to obtain permission from Queen Price Chopper or its insurance carrier or obtain an order from the Judge before seeing a physician for his needed ongoing medical care. In short, Mr. Stephens requests the Board to award him benefits for a permanent total disability and ongoing medical care.

Conversely, Queen Price Chopper and its insurance carrier argue the Judge's finding of permanent partial general disability should be affirmed. But they also contend the Board should find that Mr. Stephens was a part-time worker and, consequently, reduce the average weekly wage to $185.31. They also request the Board to reduce any permanent disability compensation that Mr. Stephens receives because he is also receiving Social Security retirement benefits.

The issues before the Board on this appeal are:

1. Was Mr. Stephens a full-time worker earning $240 per week or was he a part-time worker earning $185.31 per week?

2. Was Mr. Stephens rendered permanently and totally disabled from engaging in any substantial gainful employment? If not, what is Mr. Stephens' permanent partial general disability?

3. If Mr. Stephens is not permanently and totally disabled, what is his post-injury wage for purposes of determining his permanent partial general disability?

4. Do Mr. Stephens' Social Security retirement benefits reduce his award of permanent disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes Mr. Stephens' award should be modified to grant him ongoing medical treatment for his June 1996 back injury.

In short, the Board finds that Mr. Stephens injured his back on June 26, 1996, while working for Queen Price Chopper. As a result of that accident, Mr. Stephens underwent a laminectomy and, later, a double fusion at L4-5 and L5-S1.

As indicated by Dr. Edward J. Prostic, whom the Judge requested to conduct an independent medical evaluation, Mr. Stephens sustained a 25 percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) due to the June 1996 accident and resulting surgeries. The Judge, who was persuaded by Dr. Prostic's opinions, determined Mr. Stephens retained the ability to perform light work duties. The Board agrees.

According to Dr. Prostic, Mr. Stephens should avoid repetitive bending or twisting at the waist, avoid vibrating equipment, and avoid frequent pushing or pulling. The doctor believes Mr. Stephens, who is in his mid-seventies, is capable of lifting 15 to 20 pounds on an occasional basis. The doctor believed the only thing that prevented Mr. Stephens from performing light duty work was his psychological status. The doctor, however, indicated that he was not an expert in psychological abnormalities as that was more in the province of a psychotherapist.

The Board also affirms the Judge's finding Mr. Stephens' average weekly wage was $240 per week. The Board adopts the Judge's analysis in which he determined Mr. Stephens should be considered a full-time worker for purposes of this claim.

The Board also concludes that Mr. Stephens has not made a good faith effort to find appropriate employment. The Board viewed the videotapes introduced into evidence. Some of the activities depicted on those tapes support the conclusion that Mr. Stephens retains the ability to perform work in the open labor market, despite the June 1996 back injury. But Mr. Stephens has not sought employment.

Permanent partial general disability is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in

> any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

But the Kansas Court of Appeals in *Watson*[4] recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[5]

The Board is aware that Mr. Stephens' vocational expert Michael Dreiling believed Mr. Stephens was realistically unemployable. But that opinion was countered by Monty Longacre, who testified for Queen Price Chopper and its insurance carrier that Mr.

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *Id.* at 320.

[4] *Watson v. Johnson Controls, Inc.*, ___ Kan. App. 2d ___, 36 P.3d 323 (2001).

[5] *Id.* at Syl. ¶ 4.

Stephens retained the ability to perform sedentary and light duty jobs and earn up to $6.50 per hour. The Board concludes Mr. Longacre's assessment of Mr. Stephens' ability to work and earn wages is more accurate than Mr. Dreiling's. Consequently, the Board concludes Mr. Stephens retains the ability to earn at least 90 percent of the wages that he was earning on the date of accident.

Accordingly, as Mr. Stephens' imputed post-injury wage for purposes of the permanent partial general disability formula is at least 90 percent of the pre-injury wage, the permanent partial general disability is limited to Mr. Stephens' 25 percent whole body functional impairment rating.

Queen Price Chopper and its insurance carrier request the Board to reduce the benefits awarded Mr. Stephens to the extent of his Social Security retirement benefits. That request is denied. Mr. Stephens began receiving Social Security retirement benefits before he began working for Queen Price Chopper. Consequently, the offset under K.S.A. 1996 Supp. 44-501(h) does not apply.[6]

> When a retired person who works to supplement social security income suffers a second wage loss when injured in the course of employment, K.S.A. 1998 Supp. 44-501(h) does not apply.[7]

Finally, Mr. Stephens' award should be modified to grant him ongoing medical treatment. The parties do not dispute that Mr. Stephens must see a physician on a regular basis to monitor his prescription medications. Accordingly, Queen Price Chopper and its insurance carrier are responsible for Mr. Stephens' ongoing medical expenses, which are reasonable and necessary and which are directly related to the June 1996 back injury.

The Board adopts the findings and conclusions set forth in the Award and the Nunc Pro Tunc Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the May 15, 2002 Award and the May 20, 2002 Nunc Pro Tunc Award to grant Mr. Stephens ongoing medical benefits for his June 26, 1996 back injury. The remainder of the orders set forth in the Award and the Nunc Pro Tunc Award are adopted by the Board as its own.

IT IS SO ORDERED.

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[6] *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

[7] *Id.* at Syl. ¶ 2.

Dated this ____ day of December 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Director, Division of Workers Compensation